Supreme Court, U.S.
FILED
99 327 JUN 10 1999
OFFICE OF THE CLERK

No. _____

In the
Supreme Court of the United States

SCOTT DANIELSON,
Petitioner,

vs.

STATE OF HAWAI`I
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF HAWAI`I

PETITION FOR WRIT OF CERTIORARI

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37 pp

QUESTIONS PRESENTED FOR REVEIW

1. Whether the trial court erred by allowing the prosecutor, on cross examination of the defendant, to bring up his prior sexual assault conviction? Must the court give limiting jury instructions?

2. May a defendant be required to stand trial and a conviction be sustained where only hearsay evidence was presented to the Grand Jury which indicted him? An invitation to overrule Costello vs. United States.

3. Did trial counsel for defendant render ineffective assistance of counsel under test set forth in Strickland vs. Washington?

4. Was it prosecutorial misconduct to allow hearsay evidence to gain an indictment and prosecutorial misconduct to impeach the defendant with a prior sexual assault conviction, and did the prosecutor commit misconduct in his closing arguments?

5. Whether the sentence of life with parole, with only one prior felony conviction, constitutes Cruel and Unusual punishment in violation of the Eighth Amendment? And whether Petitioner's sentence was in violation of the Fifth Amendment prohibition concerning Double Jeopardy?

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To the Honorable Justices of the Supreme Court:

The Petitioner, Scott Danielson, respectfully prays that a Writ of Certiorari be issued to review the judgment and order of the Supreme Court of the State of Hawai`i entered on February 10, 1999.

OPINION BELOW

The Order of the Supreme Court of Hawai`i is attached in Appendix "A." The order was not reported.

JURISDICTION

The judgment of the Court below in Appendix "B" was entered on February 10, 1999. Reconsideration was denied on February 3, 1999, and is attached in Appendix "C." The jurisdiction of this Court is invoked under 28 U.S.C § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the U.S. Constitution in relevant part states: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of its citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Fifth Amendment to the U.S. Constitution in relevant parts provide a guarantee to an accused the right to presentment or indictment by a grand jury. "Further, [n]or

shall any person be subject for the same offense to be twice put in jeopardy of life or limb."

The Sixth Amendment to the U.S. Constitution provides, in relevant part, that in all criminal prosecutions, the accused shall "... have the assistance of counsel for his defense."

The Eighth Amendment to the U.S. Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

STATEMENT OF THE CASE

On November 15, 1996, Petitioner, SCOTT DANIELSON, was indicted by a Maui Grand Jury for violating Hawaii Revised Statute § 707-730 (1), sexual assault in the first degree, and § 707-732 (1) sexual assault in the third degree. The *only* witness at the grand jury hearing was a Maui police officer who related to the jurors the information underlying the indictment that was told to him by the complaining witness, an eight-year-old girl who was unavailable to testify.

Following a jury trial that lasted less than four days, Petitioner was convicted of both counts in the indictment. At the Petitioner's trial he was represented by the public defender. During direct examination of Petitioner, the public defender asked the Petitioner: "have you ever tried to have any [sexual] contact like that with [the complaining witness]?" The Petitioner responded by stating: "I don't do children."

The trial court believed that this statement "opened the door" and, consequently, it allowed the prosecution to impeach Petitioner with details of Petitioner's prior sexual assault conviction that was of similar nature. The trial court sentenced the Petitioner to Life in prison with the possibility of parole, using several of Hawai`i sentencing laws to enhance Petitioner's imprisonment terms. This enhancement

included clauses used against a repeat offender, extended terms, multiple offender, and an offender against children.[1]

The Petitioner appealed to the Hawai`i Supreme Court where his conviction was upheld in a "Summary Disposition Order."

SUMMARY OF ARGUMENT

This case involves several important principals of law that are fundamental to any system of justice. These principals concern the Petitioner's right to have a fair trial not prejudiced by admission of prior offenses influencing the jury; the right to have the court function properly in its methods by giving adequate and necessary instruction to the jury; the right to have a trial without misconduct of the law from the prosecution; the right to have competent legal representation from counsel; the right to be subject to an indictment only from competent evidence admitted to the grand jury; moreover, the Petitioner has also the right that punishment for the offense be given fairly and not excessively.

[1] Hawaii Revised Statutes [HRS] § 706-606.5, 706-662, 706-662 (4), 706-662 (5).

REASONS FOR GRANTING THE WRIT

ARGUMENT

1.

A. Admission of Prior and No Limiting Instructions Given to the Trial Court

At Petitioner's jury trial for sexually abusing a minor female, the Petitioner testified. On cross examination, the prosecutor was allowed by the trial court, over objection, to ask the Petitioner/witness:

> "And isn't true that you were accused of visiting the Weiss-Fenik family and you were accused of molesting their seven-year-old daughter by wanting to have sexual contact with you and by placing your finger in her vagina?" (T7, at 11).[2] The Petitioner responded: "Yes." (T7, at 11).

The prosecutor continued cross examination by asking:

> "Isn't it true that you were convicted in the criminal file 3505 in Minnesota for criminal sexual conduct in the second degree for sexually molesting that seven-year-old girl?" (T7, at 12). Petitioner replied: "Yes, but ... it was a nolo contendere. A conviction does not make a person guilty." (T7, at 12-13).

> Petitioner testified that he pled no contest "[u]nder advisement of my attorney at the time" because "my attorney suggested to just get things over with, if I

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[2] Hereinafter "T" refers to transcripts on appeal, volume number and page.

wanted to get back on with my life, that I should do that[,]" and because "I was naive. I've never been involved in the criminal court system before." (T7, at 11).

The prosecutor was allowed to ask the Petitioner these questions by the trial court. The rationale for doing so is stated as follows:

> "The court's going to rule that the defendant has opened the door by his statement which denies any previous involvement of himself with female children in a sexual type of way. His statement that, 'I don't do kids', clearly, as far as the Court is concerned, reflected upon his denial of such conduct. The fact that subsequently the State has advised the Court that he has previous conviction for molesting a minor female is, as far as this Court is concerned, relative – relevant, excuse me, and more probative that it is prejudicial. Especially since the defendant did, as far as the Court can see, knowingly and understandably answer the questions of his own attorney." (T7, at 5).

During Trial Counsel's direct examination of Petitioner, Petitioner testified in relevant part as follows (T7, at 5):

Q. Have you ever had any sexual or intimate contact with Christine Mitchell?
A. Not with Christine.
Q. Have you ever tried to have any contact like that with her?
A. I don't do children.

The federal courts have ruled that prosecutors go beyond proper considerations by informing the jury the nature of the prior, as stated in the following case in brief:

> "Even assuming that the trial court was correct in allowing the jury to learn that [Phelps] had been previously convicted of a felony, there had been there was no need to inform the jury of the *nature* of that felony. The government could have used the more abstemious approach of asking Phelps to stipulate that he had been convicted of a felony, thereby avoiding undue prejudice from the introduction of proof of the [sodomy] conviction. To have made the jury aware of the nature of the offense went beyond the purpose for which the government asserted the right to introduce evidence of other crimes." United States vs. Cook, 538 F. 2nd 1000, 1005 (1976). [Footnote omitted]

Interestingly enough, the Petitioner in this case did in fact "stipulate" to the prior felony before the trial commenced.[3] Recently, the U.S. Supreme Court in United States vs. Old Chief, 519 U.S. 172 (1997) reversed a conviction based on Rule 403 of the *Federal Rules of Evidence*, holding that the district court abused its discretion by rejecting the defendant's offer to concede the fact of a prior conviction, and instead admits the full record of a prior judgment, when the name or nature of the prior offense raises the risk of a verdict tainted by improper considerations, and when the purpose of the evidence is solely to prove the element of prior conviction. This case presents the court with a similar opportunity to clarify the discretion of a trial court.

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[3] See Record on Appeal, pages 110-114, (hereafter referred to as "R.A.").

In United States vs. Cook, supra, page1004, the court also ruled:

> "Where, as here, evidence of other crimes is relevant to a collateral issue only, the trial court must consider the government's actual need for that evidence. The necessity for the testimony in question must be measured against the high potential that proof of a prior offense has for arousing the jury against the accused. [Footnote omitted]
>
> To apply these precepts, it must be recognized that there are substantial possibilities, in the context of this case, that a jury will harbor strong adverse sensitivity to evidence of ... deviant behavior. This creates a significant 'risk' of 'undue prejudice' which must be overcome by a showing of necessity by the government." [Footnote omitted, emphasis added]

In the case at bar, Petitioner claims that his due process of law rights guaranteed by the Fourteenth Amendment to the U.S. Constitution were violated because of the admission into trial evidence a prior conviction of similar nature that prejudiced his case, while the State advanced no legitimate cause in doing so. The dissent pointed out concerning the case of Spencer vs. Texas, 385 U.S. 554, 570, (1967) is consistent with the Petitioner's argument in that:

> "It seems to me that the use of prior-convictions evidence in these cases is fundamentally at odds with traditional notions of due process, not because this procedure is not the nicest resolution of conflicting but legitimate interests of the State and the accused, but because it needlessly prejudices the accused without advancing any legitimate interest of

the State. If I am wrong in thinking that the introduction of prior-convictions evidence serves no valid purpose I am not alone, for the Court never states what interest of the State is advanced by this procedure. And this failure, in my view, undermines the logic of the Court's opinion."

More support for this proposition is voiced by some other commentators who have stated on the issue of admitting evidence of other crimes in an opinion as follows:

"Probably the principal reason for limiting the use of "other crimes" evidence at trial has been the fear that such evidence will prejudice jury against the accused. The notion of prejudice encompasses two distinct tendencies of jurors. The first is the tendency to convict a man of the crime charged, not because he is guilty of that offense, but because evidence introduced indicates that he had committed another unpunished crime or that he is a *"bad man"* who should be incarcerated regardless of his present guilt. A conviction for this reason would violate the principle that a man may be punished only for those acts with which he has charged. The second is the tendency to infer that because the accused committed one crime, he committed the crime charged. In many instances this inference rests on no greater foundation than the belief that commission of one crime indicates a propensity to commit others." [Footnote omitted, see generally: Notes, Other Crimes Evidence at Trial: Of Balancing and Other Matters, 70 Yale Law Jour. 763 (1961)].

Further problems are addressed in admitting prior convictions by the court in Spencer vs. Texas, supra, page 577, in stating:

"Similarly, when prior convictions are introduced to impeach the credibility of a defendant who testifies, a specific purpose is thought to be served. The theory is that the State should be permitted to show that the defendant-witness' credibility is qualified by his past record of delinquent behavior. In other words, the defendant is put to the same credibility test as any other witness. A defendant has some control over the State's opportunity to introduce this evidence in that he may decide whether or not to take the stand. Moreover, the jury hears of the prior convictions following a defendant's testimony, and it may be thought that this trial context combined with the usual limiting instruction results in the jury's actually behaving in accordance with the theory of limiting instructions: that is, that the prior convictions are only taken into account in assessing the defendant's credibility."

In the case at bar against the Petitioner, this Band-Aid remedy fails because the fact that even if the Petitioner did "open the door" for purposes of admitting his prior to impeach his credibility, the prosecution here went beyond proper questioning methods by using overly broad and improper questioning of the Petitioner about his prior in front of the jury, when he asked Petitioner, on cross examination:

"Back in 1987 the Weiss-Fenik family had a seven-year-old daughter, is that correct [?]... and isn't it true that you were accused of visiting the Weiss-Fenik family and you were accused of molesting her seven-year-old daughter by wanting her to have sexual contact with you and by placing you finger in her vagina?" (T7, at 11).

This questioning was improper in light of the fact the present charges concerned an eight-year-old girl and accusations of touching her "vagina" and "wanting" to have sexual contact with her. The State of Hawai`i has rules limiting the use of prior conviction evidence.[4]

Notably, Rule 609(a) only refers to *evidence* of *convictions*, and does not contain any references to the admissibility of *details* surrounding the convictions which are used to impeach the accused. One ostensible reason the rule makes such a distinction is the inherent danger that a jury would consider in such details on the nature of convictions as evidence, and that jurors are likely to conceive the accused as having committed the crime alleged instead of as impeaching evidence on credibility. See, e.g., United States vs. Roenigk, 810 F. 2nd 809, 815 (8th Cir. 1987); and United States vs. Cox, 536 F. 2nd 65, 71 (5th Cir. 1976). Such danger is especially viable when the prior convictions involve crime(s) for which the accused is on trial. See United States vs. Roenigk, supra.

Thus, the general rule is that if a criminally accused is impeached by use of a prior conviction under Rule 609 of the Hawai`i Rules or the *Federal Rules of Evidence*, the only matters as to the prior conviction which should be elicited are (1) the date of conviction, (2) the fact of conviction, and (3) the nature of the crime.

Here the Petitioner argues that the impact of the jury hearing of Petitioner's prior sexual assault conviction of a seven-year-old female in a trial of a similar nature, here an eight-year-old girl at her house, causes extreme prejudice, confusion, and false conceptions to arise in the minds of the jury, leading jurors to preconceive an unfair verdict based on the idea that "if he [the Petitioner] did it before, then he's done it this time too."

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[4] See Rule 609(a) in *Hawaii Rules of Evidence* and its corresponding rule in *Federal Rules of Evidence*, Rule 609.

B. Limiting of Cautionary Jury Instruction

Even after the court allowed the evidence of the prior sex offense to be admitted, the court did not caution the jury as to weigh that evidence in relation to the overall context of the case. In addition, the court did not give any instruction whatsoever to the jurors at the conclusion of the trial to exercise caution in weighing the prior sex offense conviction when reaching a verdict. In another case, United States vs. Diaz, the federal court has dealt with this issue before:

> "The sole issue, therefore, is whether the failure of the trial judge in this case to give such an instruction [cautionary], sua sponte, is reversible error. It does not appear this precise question has been determined before by this circuit [fifth]." United States vs. Diaz, 585 F. 2nd 116, 117 (1978).

In United States vs. Diaz, supra, neither Diaz's counsel not the government requested the trial judge to charge the jury that the evidence of Diaz's prior conviction was only to be considered for a limited purpose, and the court, sua sponte, did not give a cautionary instruction.

The record is clear at bar, that neither the Petitioner's public defender nor the prosecutor requested the aid of a curative instruction on a prior identical to the charges which Petitioner was on trial for. (R.A. pp. 25-31, R.A. pp. 40-41). In fact, as it has been shown in United States vs. Diaz, supra, page 118, prejudicial error in reaching a verdict is a consequence of cautionary instruction not being given, as stated persuasively:

> "We recognize the salutary rule that empowers the trial judge to exercise discretion in determining what curative instructions is required and hold only that the defendant has a prior conviction for the same

> offense for which he is being tried, both counsel and the court have a duty to minimize the risk that the jury would infer guilt on the cocaine charges from the fact of previous convictions on cocaine charges. Thus, in this situation where no cautionary instruction is given to the jury, the prejudicial error has intervened." [Emphasis added]

Also for more on the impact of limiting cautionary jury instruction, please see: United States vs. Ailstock, 546 F. 2nd 1285 (6th Cir. 1976), United States vs. Bobbitt, 450 F. 2nd 685 (1971), Evans vs. Cowan, 506 F. 2nd 1248 (6th Cir. 1974), and State vs. Santiago, 53 Haw. 254, 258, and 492 P. 2nd 657, 660-661 (1971) citing "the danger of prejudice is scarcely mitigated by an instruction to consider the prior convictions only in determining whether or not the defendant's testimony is credible."

In Petitioner's trial, the court failed to instruct the jury to exercise caution at the time of the admission of the evidence, as well as failed to do so at the conclusion of the trial. By all reason, the admission of a prior child sexual assault conviction in a case where a person is charged with an identical crime calls for the court to give the jury limited or cautionary instructions. Failure to do so violates the Petitioner's due process rights and "tends to cause the jury to reach its decision on an improper basis." [See United States vs. Roenigk, supra, page 816, footnote #2]. The instruction is critical in helping the jury understand complex areas of law and is potently stated by the Federal Judicial Center, as follows below:

> "Note that the amendment considered by the Advisory Committee to Rule 609 required the Trial Judge to give a limiting instruction upon request when Rule 609 evidence is admitted. Of course, Rule 105 already requires an instruction in these

circumstances, but there is no way that the point can be overemphasized. An *instruction is critical* in helping the jury to understand the difference between impeachment and substantive evidence, and it is instrumental in controlling, at least to some extent, the *prejudice* that will be suffered by the party associated with the witness impeached with a prior conviction.

The trial court ended in this case by not advising the jury in accordance to this rule.

2.

Using Hearsay Evidence In Procuring a Grand Jury Indictment

For forty-four years the universal rule in American courts is that the prosecution can present to a grand jury hearsay evidence to gain an indictment against an accused who must stand trial for it. **IT IS TIME TO OVERRULE COSTELLO VS. UNITED STATES**.

In the case at bar, the Petitioner respectfully requests that certiorari be granted to determine the validity of an indictment gained exclusively with hearsay evidence. In Petitioner's case, an indictment was issued by a grand jury on the island of Maui, in the state of Hawai`i, where only the investigating officer testified of the complaints of the minor in a sexual assault case, who was not available due to a "family trip." On asking for an indictment against Petitioner from the grand jury, the prosecutor asked the investigating detective for the case, questions that pertained to the complaining witness' [Christine Mitchell's] statements, which became the entire basis for the prosecution's case against the

Petitioner. These questions are to be found in excerpts from the grand jury's transcripts[5], and in brief as follows:

Q. [Prosecution] Have you, yourself, spoke to Christine Mitchell?
A. [Detective] Briefly.
Q. And was she able to be present today to testify?
A. No, she is not. She is unable.
Q. Why was Christine Mitchell unable to testify today?
A. They had a pre-planned family trip.
Q. When you spoke to Christine Mitchell, how did she describe what had happened to her in regards to the incident? What had happened?
A. Sometime in the afternoon or early evening between two and five p.m., possibly while in her bedroom, she was accosted, at which time she identified an adult male that removed her jeans and her underwear pulling it down to her ankles, and that she was fondled on the front genital area she identified as her vagina, and she was digitally penetrated.

The investigating detective later told the grand jury the complaining witness told him the adult male was Petitioner. There is no question the testimony made by the investigating officer to the grand jury was hearsay. In its last ruling on admitting this type of hearsay as evidence to stand trial, the United States Supreme Court delivered a question that is identical to one that Petitioner also asks, stated as follows:

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[5] Admission of these transcripts were denied by the Hawaii Supreme Court as part of the Appeal's Record, even though trial court ordered their preparation.

"May a defendant be required to stand trial and a conviction be sustained where only hearsay evidence was presented to the grand jury which indicted him?" Costello vs. United States, 350 U.S. 359 (1956).

In a very short six page decision, the court ruled in Costello vs. United States, supra, pages 361-362, that:

"The Fifth Amendment provides that federal prosecutions for capital or otherwise infamous crimes must be instituted by presentments or indictments of grand juries. But neither the Fifth Amendment nor any other constitutional provision prescribes the kind of evidence upon which grand juries must act. The grand jury is an English institution, brought to this country by the early colonists and incorporated in the Constitution by the Founders. There is every reason to believe that our constitutional grand jury was intended to operate substantially like its English progenitor. The basic purpose of the English jury was to provide a fair method for instituting criminal proceedings against persons believed to have committed crimes."

The Petitioner here, as in Costello vs. United States, supra, asserts that an indictment based solely on hearsay evidence violates his Fifth Amendment rights because hearsay evidence is not competent or trustworthy enough to be presented to the grand jury. Likewise, it is the Petitioner's concern that American courts are operating in a disruptive manner due to this ruling of Costello vs. United States that occurred forty-four years ago. In another case, United States vs. Payton, 363 F. 2nd 996 (1966), Circuit Judge Friendly stated in dissent on pages 999-1000 the following:

"The course followed by the Government in this case makes a mockery of the Fifth Amendment's guarantee that 'no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury'. What compromises this indictment is not that the grand jury heard only hearsay testimony, as in Costello vs. United States, 350 U.S. 359, 76 S. Ct. 406 (1956), but that, in sharp contrast to that case, it had no way of knowing that the testimony which was all it was hearing was hearsay.

'An indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits', 350 U.S. at 363, 76 S. Ct. at 409, could never have been meant to validate anything like what happened here; on the contrary I am convinced that if Costello had presented facts like these, the court would have dismissed the indictment on the ground, stated by Mr. Justice Burton, that 'to hold a person to answer to such an empty indictment for a capital or otherwise infamous federal crime robs the Fifth Amendment of much of its protective value to the private citizen'. 350 U.S. at 364, 76 S. Ct. at 409 (concurring opinion)."

In United States vs. Umans, 368 F. 2nd 725, 730 (1966), the use of hearsay evidence was likewise addressed as having distorted an individual's rights when used as the basis for a trial, that court concluding the following:

"While we are not condemning the procedure used before the grand jury, we think it not amiss for us to state that the *excessive use of hearsay* in the

> presentation of government cases to grand juries tends to destroy the historical function of grand juries in assessing the likelihood of prosecutorial success that grand juries are supposed to afford to the innocent. Hearsay evidence should *only* be used when direct testimony to summon witnesses able to testify to facts of personal knowledge." [Emphasis added]

In the Petitioner's case at bar, at the grand jury hearing, the complaining witness Christine Mitchell, did not testify and instead her story was related to the grand jurors by the investigating detective, David Mediros.[6] The investigating detective also testified that the complaining witness could not testify because she was on vacation.[7] Quoting another dissent on this subject, in United States vs. Beltram, 388 F. 2nd 449, 451-452 (1968) it was stated:

> "As the grand jury may and often does refuse to indict, it seems to me that it is only just and fair to require the prosecutor at least to warn the grand jury that most or all of the proofs presented are at second hand. Of even greater significance, in my opinion, is the evil practice, especially in narcotics cases, of using before the grand jury only a peripheral witness, who recites in more or less narrative fashion what other narcotics agents have seen, heard or done."

Additionally, the use of hearsay to gain an indictment overburdens the court system with unnecessary cases and, as some courts have illustrated, is tantamount to prosecutorial misconduct to offer only hearsay evidence. Please see:

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[6] See Transcript of Proceeding before the Grand Jury on Friday, November 15, 1996.

[7] Grand Jury Transcript, page 7, line 16-21

United States vs. Williams, 504 U.S. 36, 69 (1992), and also see Argument 4 herein for further elaboration.

The call in Costello to counsel to advance "persuasive reasons" for excluding traditionally incompetent evidence like hearsay into our courts leaves the door open for this court to admonish prosecutors who routinely use hearsay evidence in gaining an indictment to take heed. Please see: United States vs. Estepa, 471 F. 2nd 1132 (1972). In this case, on page 1137, supra, a conviction was reversed, and an indictment dismissed based upon the use of hearsay in front of the grand jury, stated in brief:

> "We had hoped that, with the clear warnings we have given to prosecutors, going back to United States v. Umans, 368 F. 2nd 725, 730 (2 Cir. 1966), cert. granted, 386 U.S. 940, 87 S. Ct. 975, 17 L. Ed. 2nd 872 cert. dismissed as improvidently granted, 389 U.S. 80, 88 S. Ct. 253, 19 L. Ed. 2nd 255 (1967), and the assurances given by United States Attorneys, see United States v. Arcuri, supra, 405 F. 2nd at 693 & n. 4, a reversal for improper use of hearsay before the grand jury would not be required.
>
> Here the Assistant United States Attorney, whether wittingly or unwittingly – we prefer to think the later, clearly violated the first of these provisos. We cannot, with proper respect for the discharge of our duties, content ourselves with yet another admonition; a reversal with instructions to dismiss the indictment may help to translate the assurances of the United States Attorneys into consistent performance by their assistants. As Judge Medina said in his dissent in United States v. Beltram, supra, 388 F. 2nd at 453, 'this would not let appellants go scot free, as there would be time to reindict them and have their guilt or innocence passed upon again on a

record not tainted with irregularity'. See United States v. Ball, 163 U.S. 662, 671-672, 16 S. Ct. 1192, 41 L. Ed. 300 (1896).

3.

Ineffective Assistance of Counsel

The threshold question for the Petitioner's case at bar is whether or not his court appointed public defender has met the guidelines guaranteed to him by the Sixth Amendment, which not only promises him the right to have counsel present, but also mandates that he receive the assistance of a reasonably competent attorney.

The Court has established criteria for a defendant's representation of counsel, and follows that this representation must not fall below an "objective standard of reasonableness" under the prevailing professional norms considered and practiced by United States attorneys. To illustrate how one might make a claim for representation with ineffective assistance of counsel we can turn to Strickland vs. Washington, 466 U.S. 668 (1984), where:

> "This court established a two-prong test to be applied to claims of ineffective assistance of counsel. First, a defendant must show deficient performance by counsel and, second, that counsel's deficient performance prejudiced the defense and deprived the defendant of a fair trial."

In the case at bar, the salient issue is that the public defender did not prepare or make any motions, before or during the trial to dismiss the indictment that was based on hearsay. Further, is the counsel's apparent lack of communicating to his client [Petitioner] of what the trial court concluded as evidence of him having "opened the door" to

allow prosecution to question him on his prior sexual assault conviction in front of a jury, the impact of which, for sure, having a major role in prejudice against the Petitioner, and consequently, the outcome of the trial.

Had the prior conviction of the Petitioner that was of identical nature not been heard in front of the jury, the outcome of the trial would have been quite different. If the public defender in the case against Petitioner had been better prepared, he would have not *invited* the errors admitted to the trial court that impacted so powerfully the case against Petitioner by asking him, on direct examination, knowing he had a prior conviction, such loaded questions as:

Q. Have you ever had an sexual or intimate contact with Christine Mitchell?
A. Not with Christine.
Q. Have you ever tried to have any contact like that with her?
A. I don't do children.

For these reasons it is asserted that Petitioner's counsel fell below the standard that mandates representation from a reasonably competent attorney, a right guaranteed to Petitioner by the Sixth Amendment. In fact, the public defender's incompetence that led to the Petitioner's prior sexual assault conviction being admitted into evidence was so great that it was completely disastrous to his right to a fair and unprejudiced trial. As in United States vs. Cronic, 466 U.S. 648 (1984) we have seen that presumption of guilt against a defendant need not even come out of actual evidence presented in the case but instead, as *Dicta* in Cronic, supra, suggested, in rare circumstances, the assistance of counsel might be so lacking that reviewing courts can presume prejudice to the accused, without inquiry into the actual impact of counsel's performance on the outcome of the trial. See: United States vs. Cronic, 466 U.S. at 662.

4.

Misconduct of the Prosecutor

The Petitioner claims that the prosecutor in his case committed misconduct that amounted to extreme prejudice in his trial in three ways. First, the Petitioner claims that the prosecutor acted in misconduct by presenting only hearsay evidence to gain an indictment before the grand jury. Second, the prosecutor acted in misconduct during cross-examination of the Petitioner by questioning him about his prior sexual assault conviction in front of the jury, and third, misconduct was involved during the prosecutor's closing argument, as he made reference to his own "son" calling to the jury to "stop the game now," personally degrading the Petitioner. This misconduct was tantamount to an improper final argument against Petitioner. Misconduct on behalf of the prosecution, as it is for all persons involved in a courtroom, is an intolerable practice in a court of law, and as Justice Stevens wrote in dissenting opinion in United States vs. Williams, 504 U.S. 36, 68-69 (1992) such behavior is solid ground for dismissal or reversal of an outcome of a case. In brief, Justice Stevens states:

> "It blinks reality to say that the grand jury can adequately perform this important historic role if it is intentionally misled by the prosecutor – on whose knowledge of the law and facts of the underlying criminal investigation the jurors will, of necessity rely.
>
> Unlike the court, I am unwilling to hold that countless forms of prosecutorial misconduct must be tolerated – no matter how prejudicial they may be, or how seriously they may distort the legitimate

> function of the grand jury – simply because they are not proscribed by Rule 6 of the Federal Rules of Criminal Procedure or a statute that is applicable in grand jury proceedings. Such a sharp break with the traditional role of the federal judiciary is unprecedented, unwarranted, and unwise.
>
> Unrestrained prosecutorial misconduct in grand jury proceedings is inconsistent with the administration of justice in the federal courts and should be redressed in appropriate cases by the dismissal of indictments obtained by improper methods." [Footnote omitted]

The intentional use of hearsay evidence to secure an indictment against the Petitioner is an act of misconduct made by the prosecutor in this case, and should be grounds to grant the petition for writ of certiorari in favor of Petitioner. Further in his closing argument, the prosecutor used several erroneous and harmful statements against Petitioner that reflected his own personal opinion, and not necessarily a true statement of the evidence. In his final argument, the prosecutor told the jury:

> "If you were in [counsel's] world no one sits down or lies down or is taking their pants off or putting them on. Everybody stands up. I guess I better tell *my little boy* 'you better not sit down when he's taking his pant's off'." [Emphasis added]

In referring to some act he does with his son, if he has one, in his argument to a child sexual abuse jury, the prosecutor gave himself an upper authority or personal feeling to the jury that was improper conduct. This type of argument has a tendency to wrongly influence the jury, calling for the jurors, already emotionally charged from the whole

proceedings of the trial, to "look up" to authority, and conceptualize "personal sentiment" for the prosecutor's case against the accused.

Hawai`i courts indeed have commented on a prosecutor's use of personal opinions to get a point across to a jury. In State vs. Marsh, 68 Haw. 659 at pages 660-661 it is stated:

> "The rationale for the rule is that 'expressions of personal opinion by the prosecutor are a form of unworn, unchecked testimony and tend to exploit the influence of the prosecutor's office and undermine the objective detachment that should separate a lawyer from the cause being argued'."

In personally involving himself with the trial and with the accused alleged crimes, commenting on behalf of *his own little boy* , the prosecutor created an atmosphere of guilt that prejudiced the trial, and consequently, influenced the jury to reach a conviction against the Petitioner. As the United States Supreme Court said in Berger vs. United States, 295 U.S. 78, 88, (1935) this created atmosphere of guilt has no place in a court trial, and indeed is grounds for ruling that there was misconduct on behalf of the prosecutor in this case. The Court states firmly that:

> "It is as much his duty [the prosecutor] to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one. It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuations and, especially, assertions of personal knowledge are apt to carry much weight against the

accused when they should properly carry none." (295 U.S. 78, 88).

Further in his closing argument, the prosecutor used expressions and descriptive words that were uncalled for and without being backed by any evidence. The prosecutor told the jury:

> "In Minnesota [Petitioner] was 'naive'. What does that make him now? Smart? He's savvy. He's smooth. And he's got a long answer for everything. Again, it's been said, better a bad excuse than no excuse at all. And you've heard a lot of bad excuses from the defendant."

From these statements the prosecutor seemingly knows much about the life of the accused, Petitioner. Yet these statements come unchecked, and unwarranted, and are nothing more than personal attacks on the Petitioner. The World Book Encyclopedia Dictionary (1963) defines "savvy" as "to know," "knowledgeable," and was used by the prosecutor as if to say, sarcastically, "you think you are wise, you think you know, but there are a lot of things you don't understand." Petitioner strongly opposes this statement, and suggests that the tone, wording, and flavor of the prosecutor's final argument to the jury was inflammatory.

No evidence was introduced to show that the Petitioner was in any way "savvy" or "smooth," and instead these expressions sound like a commentary that is a personally and emotionally motivated attack from the prosecutor. Likewise, it was misconduct for the prosecutor to ask the jury to convict Petitioner by saying in final argument:

> "[Petitioner] told his eight-year-old victim, 'we're going to play a game', he has not stopped playing that game. He's still playing the game. He's been

playing the game for the past three years. He's been playing the game for the past four days. It's time, ladies and gentlemen, to stop the game now. Make him do what he refuses to do and find him guilty of the crimes he committed."

Improperly asking the jury to make Petitioner "stop the game now" and "find him guilty of the *crimes* he committed" is an abuse of influence on the jury from the prosecutor. In ostensibly including Petitioner's prior sexual assault conviction in the closing statement of the trial on *this charge* the prosecutor is in violation of the due process rights guaranteed to all persons standing trial for a criminal offense.

Petitioner expresses concern over the outrageous disregard by the prosecutor not only of his rights in this case, but of all citizens who have come to expect that criminal proceedings will be conducted in an impartial and efficient manner, without a prejudiced atmosphere of guilt. The words of Justice Sutherland in Berger vs. United States, 295 U.S. 78, 88 (1935) bear repeating:

"The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor – indeed, he should do so, but while he may strike hard blows, he is not at liberty to strike fowl ones. It is as much his duty to refrain from improper methods calculated to a wrongful conviction as it is to use every legitimate means to bring about a just one."

5.

Is Life With Parole a Constitutionally Valid Sentence For a Person With ONE Prior Felony? And Does Petitioner's Sentence Violate Double Jeopardy?

As Justice Scalia wrote in Harmelin vs. Michigan, 501 U.S. 957, 996 (1991),

> "It is true that petitioner's sentence is unique in that it is the second most severe known to the law; but life imprisonment with possibility of parole is also unique in that it is *the third most* severe."

Here in this matter, Petitioner, with one class B felony conviction was sentenced to life in prison with the possibility of parole, after the jury convicted him of sexual assault in first degree in violation of Hawaii Revised Statutes [HRS] § 707-730 (1)(b), and sexual assault in the third degree in violation of HRS § 707-732 (1)(b). In Hawai`i, sexual assault in the first degree is a class "A" felony with a mandatory sentence of 20 years imprisonment. Sexual assault in the third degree is a class "C" felony with a maximum sentence of 5 years imprisonment.

In the case at bar then, the Petitioner was sentenced to an extended Life imprisonment with the possibility of parole. He faced a maximum penalty of 25 years. The issue here is two-fold, whether this sentence violates the Petitioner's Eighth Amendment right to the United States Constitution, a prohibition against Cruel and Unusual Punishment, under the guidelines as set out in Harmelin vs. Michigan, 501 U.S. 957? As well as whether the use of sentencing enhancement violates Petitioner's Fifth Amendment right of prohibition against Double Jeopardy?

Harmelin, supra, which overruled the long standing principal of proportionality, i.e. that punishment is "proportionate" to the crime, as outlined in Solem vs. Helm, 463 U.S. 277 (1982), did leave open the door for a sentence such that would be considered in violation of the cruel and unusual clause of the Eighth Amendment, such as the one given to Petitioner. Please see Harmelin vs. Michigan, 501 U.S. 957, 984, footnote No. 10.

Petitioner calls to the attention that a sentence of Life with the possibility of parole for a conviction of two felonies, with a prior record of only one felony is illegal, as it goes beyond the concepts of humanity and fairness as outlined in Furman vs. Georgia, 408 U.S. 238 (1971). See also: Thompson vs. Oklahoma, 487 U.S. 815 (1988), and recently United States vs. Bajakaiian, 514 U.S. __ , 141 L. Ed 2nd 314, 118 S. Ct. __ (1998), that decided the excessive fines clause of the Federal Constitution Eighth Amendment.

Not only does humanitarian rules and fundamental fairness apply here, Petitioner asserts as well that the enhancement statutes applied to Petitioner's sentence violates another of the clauses set forth by the Fifth Amendment, that is the prohibition against Double Jeopardy. It can be reasonably argued here that each time the trial court used Petitioner's crime to enhance his sentence, Petitioner was put in "jeopardy."

The court sentenced Petitioner to more jail time because of "multiple felonies" committed during the same act, an act that Petitioner was already subject to 25 years in prison for. In addition, the court enhanced the sentence more because the crime was committed against "a child eight years or younger," thereby putting Petitioner in jeopardy once more for the same offense. The Petitioner calls attention to the fact that this sentencing violates the Petitioner's Fifth Amendment right that prohibits punishing the Petitioner again for the same crime.

As the Court ruled in, Mongue vs. California 524 U.S. __, 141 L. Ed. 2nd 615, 118 S. Ct. __ (1998) where it is stated clearly:

> "The Double Jeopardy Clause of the Fifth Amendment, applicable to the States through the Fourteenth Amendment, provides: '[N]or shall any person be subject for the same offence to be twice put on jeopardy of life or limb'." (U.S. Const., Amdt. 5).

What Petitioner asserts here is that sentence enhancement statutes as applied to multiple acts become so "stacked" that there could be no end to the punishment, and violates "being subject to the same offence twice" and possibly more than twice.[8] As stated by the dissent in Mongue vs. California, supra, in brief as follows:

> "The California Code is full of 'sentencing enhancements' that look exactly like separate crimes, and that expose the defendant to additional maximum punishment."

If the accused can be given an enhanced sentence for being a repeat offender, a multiple offender, or an offender against children, what would be next?[9] The statutes and circumstances are endless and need judicial intervention to

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[8] Petitioner means by "there could be no end" in that legislatures could punish a crime as many times as they see fit by erecting special classes of victims or circumstances.

[9] Would circumstances such as the crime being committed at night, in a car, in a zoo, against a rich as opposed to a poor child, etc., likewise affect the trial court's discretion or abuse thereof calling for a sentence enhancement?

correct an otherwise disoriented and unfair system of justice. And, as Justice Scalia eloquently declares in Mongue vs. California, supra:

> "I note, in any event, that *Almendarez-Torres* left open the question whether *enhancements* that increase the maximum sentence and that do not involve the defendant's prior criminal history are valid. That qualification is an implicit limitation on the Court's holding today."

CONCLUSION

The Petitioner respectfully requests the Supreme Court to grant this Writ of Certiorari for the reasons stated herein.

June 10, 1999

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Attorney for Petitioner

NO. 21084

IN THE SUPREME COURT OF THE STATE OF HAWAI`I

STATE OF HAWAI`I,	)	CR. NO. 96-0686(3)
	)	
Plaintiff-Appellee,	)	APPEAL FROM
	)	JUDGMENT; GUILTY
vs.	)	CONVICTION AND
	)	SENTENCE; NOTICE OF
SCOTT DANIELSON,	)	ENTRY, FILED ON
	)	SEPTEMBER 25, 1997
Defendant-Appellant.	)	
	)	CIRCUIT COURT OF THE
	)	SECOND CIRCUIT,
	)	STATE OF HAWAI`I

SUMMARY DISPOSITION ORDER

Upon careful review of the record and the briefs submitted by the parties and having given due consideration to the arguments made and the issues raised by the parties,

IT IS HEREBY ORDERED that the judgments or order(s) from which the appeal is taken is affirmed.

DATED: Honolulu, Hawai`i, January 12, 1999.

On the briefs:

Paul R. Dolan
for defendant-appellant

Simone C. Polak, Deputy
Prosecuting Attorney,
for plaintiff-appellee

NO. 21084

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STATE OF HAWAI`I,	)	CR. NO. 96-0686(3)
	)	
Plaintiff-Appellee,	)	APPEAL FROM
	)	JUDGMENT; GUILTY
vs.	)	CONVICTION AND
	)	PROBATION SENTENCE;
SCOTT DANIELSON,	)	NOTICE OF ENTRY
	)	FILED ON SEPTEMBER
Defendant-Appellant.	)	25, 1997
	)	
	)	CIRCUIT COURT OF THE
	)	SECOND CIRCUIT,
	)	STATE OF HAWAI`I
	)	
	)	The Honorable Boyd P.
	)	Mossman, Judge

NOTICE AND JUDGMENT ON APPEAL

TO: THE HONORABLE PRESIDING JUDGE OF THE CIRCUIT COURT OF THE SECOND CIRCUIT, STATE OF HAWAI`I:

PLEASE TAKE NOTICE that the following Judgment on Appeal is entered this day by the Supreme Court of the State of Hawai`i:

Pursuant to the Summary Disposition Order of the Supreme Court of the State of Hawai`i entered on January 12, 1999, the judgment from which the appeal is taken is affirmed.

DATED: Honolulu, Hawai`i, February 10, 1999

BY THE COURT:

/s/ Eugene L. Sabolo
Clerk

APPROVED:

/s/ Steven H. Levinson
Justice

NO. 21084

IN THE SUPREME COURT OF THE STATE OF HAWAI`I

STATE OF HAWAI`I,	)	CR. NO. 96-0686(3)
	)	
Plaintiff-Appellee,	)	
	)	
vs.	)	
	)	
SCOTT DANIELSON,	)	
	)	
Defendant-Appellant.	)	
	)	

ORDER

The defendant-appellant Scott Danielson's motion for reconsideration was filed on January 25, 1999. The summary disposition order was filed on January 12, 1999. Hawaii Rule of Appellate Procedure 40(a) (1996) requires that a motion for reconsideration be filed within ten days of the filing of the court's "opinion or ruling." Therefore,

IT IS HEREBY ORDERED that appellant's motion for reconsideration is denied as untimely.

DATED: Honolulu, Hawai`i, February 3, 1999.

Paul R. Dolan for the
defendant-appellant
Scott Danielson